United States Court of Appeals

for the Second Circuit

BRIEF FOR APPELLANT

ORIGINAL 74-1270

United States Court of Appeals

For the Second Circuit.

UNITED STATES OF AMERICA,

Appellee,

v.

JOSEPH MAURO,

Defendant-Appellant.

On Appeal From The United States District Court For The Southern District Of New York

APPELLANT'S BRIEF

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UNITED STATES COURT OF APPEALS
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———o———

THE UNITED STATES OF AMERICA,

Appellee,

-against-

JOSEPH MAURO,

Appellant.

———o———

APPEAL FROM THE UNITED STATES DISTRICT COURT,
FOR THE SOUTHERN DISTRICT OF NEW YORK

———o———

PRELIMINARY STATEMENT

The indictment herein, charged the appellant in the first count, with a conspiracy to violate 18 U.S.C. 2113(c), namely to receive, possess and transfer three cashier checks, aggregating $8,410,000.00 which were stolen from the First National City Bank, an institution insured by the Federal Deposit Insurance Corporation, in violation of 18 U.S.C. 371. The second or substantive count charged the appellant with others, for possessing and transferring the said checks in violation of 18 U.S.C. 2113(c).

After a trial in the District Court, Eastern District of New York, Judge Robert J. Ward, the appellant was convicted by a jury under both counts.

As a consequence of the conviction, the appellant was given concurrent sentences of 2-1/2 years.

STATEMENT OF THE ISSUES PRESENTED FOR REVIEW

1. Was there sufficient proof to support the conviction of the appellant under the conspiracy count, when the Government did not establish that the appellant knew that the bank was insured by the Federal Deposit Insurance Corporation and hence, could not conspire to violate any of the laws of the United States? Further, was there sufficient proof that the appellant was a member of the conspiracy?

2. If the Government did not establish that the appellant was a member of the conspiracy was the conviction of the appellant under the substantive count supported by sufficient evidence?

STATEMENT OF THE CASE AGAINST THE APPELLANT

In this case the Government's proof came mainly from a federal agent posing as a "thief" and a Government informer who was paid by the Government for his cooperation, named Olsberg. The appellant on the other hand, testified he never joined a conspiracy and even called a witness who was convicted under the conspiracy count to establish that.

Three employees of the bank described in the indictment testified to establish the theft of certain checks and forged signatures with amounts thereon. John Krump testified initially that he was the Assistant Controller of the bank (A1).* He pursued an investigation involving six (6) missing cashier's checks. The checks were formerly held at a branch of the bank located at Broadway and 56th Street (A-2, A-3). The loss of the checks was discovered in January 1973 (A-3). Three of the checks were received in evidence as Government's exhibits 2, 3 and 4 (A-3 — A-8). The loss was discovered January 13, 1973 (A-6). There was also received in evidence as Government's exhibit

*( ) This refers to the pagination of the appendix furnished by the appellant.

5, a check from the same bank. However, this check was sent to a Swiss bank for collection. The theory underlying this evidence was to corroborate an alleged conversation allegedly had between the appellant and one Coco, whom the Government claimed was a member of the conspiracy (A-11 — A-12). That check was also one of the six (6) missing checks (A-13).

Government's exhibit 5 was sent to the bank described in the indictment for collection by the Swiss bank (A-13, A-14).

It was also established through this witness that the bank was and is insured by the Federal Deposit Insurance Corporation (A-14).

The bank however paid nothing on the checks (A-15). Two of the six missing checks were never recovered (A-15).

Next, Frank Turk called by the Government, testified that he was "an official assistant" of the bank (A-19, A-20). He never signed Government's exhibit 2 (A-20). The last employee of the bank was a Miss Riggsbee who testified that she was a note and form teller for the bank at its Broadway and 56th Street branch (A-21). She identified Government's exhibits 3, 4 and 5 as cashier's checks (A-22). Her purported signature appeared on the checks but she never signed them (A-22). Nor was the ever authorized to sign any check exceeding the amount of $2,500. These checks had amounts exceeding that limitation (A-23).

The first of the two principal witnesses for the Government was the next to testify. This was an agent of the Federal Bureau of Investigation named Villano, who in the events hereinafter described posed under the name of "Romano". Shortly before the trial began he retired from the agency (A-24). He was originally assigned in this case in an undercover capacity acting in the role of "hoodlum or a thief" in order to catch "other thieves" (A-24, A-25). In this role on February 9, 1973 he met a person named "Patty" Coco. The agent using the name "Tony Romano" met him at a social club at Nostrand Avenue and Farragut Road in Brooklyn (A-25). After conversing fifteen minutes with Coco, he arranged another meeting for February 13, 1973. This was to be held at a club or a nearby bar (A-26).

On February 13, 1973 the second meeting was had. This

time the agent was with an informant named Herman Olsberg. They drove up to a bar and met Coco outside the bar (A-27). The agent told Coco that Olsberg was the "banker" and that he, the agent, had connections with the "banker" (A-28). The agent then proceeded with Coco to the latter's apartment where the agent had a discussion about the stolen checks, Coco telling the agent that he would take him to his "partner" explaining that Coco had no dealings without his "partner", (A-30). Coco, the agent and Olsberg then drove to the area of 39th Street and Farragut Road in Brooklyn (A-30). There, Coco left the car, entered a house and shortly emerged with the appellant (A-31, A-32, A-33). The appellant was introduced to the agent and the informant (A-33). A conversation ensued as to checks taken from the bank. However, the agent could not recall what was said by the particular participant, that is Coco or the appellant. As the Court stated, unless the appellant and Coco comprised a chorus or spoke in unison, the agent would have to particularize the speaker (A-34, A-35, A-41, A-43). Coco told the appellant that the agent had a source of counterfeit money. The agent produced one or two counterfeit $10.00 bills and showed them to the appellant, who commented on their quality (A-35, A-36). The appellant and the agent then discussed the price of these counterfeit bills, the agent telling the appellant that he would later give him an exact price (A-36).

Meanwhile, Olsberg who was identified as the "banker" objected to this line of conversation because he felt degraded as his status was above discussing counterfeit money since he was a "banker" (A-37). Olsberg said that he was there to deal in stolen checks and to make some "big money" (A-37). Coco told Olsberg that they had $4,000,000.00 worth of checks of the bank described in the indictment and that the checks were "stolen legitimately" (A-37). The agent further testified that Coco asked Olsberg whether he could handle two and a half million ($2,500,000.00) dollars worth of these checks (A-38).

According to the agent there was more discussion, with Olsberg's participtation, regarding the handling of the checks and their disposal. However, the agent was not able to assign the

various facets of this discussion to each particular participant (A-43 — A-45).

Coco and the agent then arranged a further meeting for February 16, 1973. Coco told the agent that his "boss" would at that meeting display the checks (A-4

On February 16, 1973, the third meeting, the appellant was not present. This meeting was held at Paxton's Restaurant (A-46). Those who attended were the agent, Olsberg (the banker), Coco and a person identified as "Mario" (A-46). Coco apologized for his boss' absence (A-47). Mario was not the appellant. Coco did say that some of the checks represented a large amount of money and that the agent would have to put up $25,000 to be held by Olsberg. Mario said nothing (A-48). Thereupon another meeting was set for February 20, 1973 (A-48).

On February 20, 1973 Olsberg and the agent went to Paxton's but Coco never came. On February 21, 1973 the agent called Coco and expressed his chagrin because Coco broke the previous appointment; Coco apologized, telling the agent that his "boss" couldn't attend and that he forgot the name of the restaurant. Another meeting was set for February 27, 1973 (A-49, A-50).

On February 27, 1973 Coco, his boss named "Bruce", kept the appointment with Olsberg and the agent (A-50). "Bruce" and Olsberg were the principal speakers (A-51). "Bruce" said he came to buttress the deal and go through all the "details". "Bruce" further stated that if Olsberg had the proper "contacts" and could "convince" him that he could dispose of the checks and further if Olsberg could furnish $50,000 to be held in escrow, "Bruce" would furnish the checks (A-51, A-57). The agent told "Bruce" that originally $25,000 was to be held and that $50,000 couldn't be raised. "Bruce" also spoke to the agent about what he expected to share (A-52). "Bruce" then asked Olsberg (the banker) how he was going to handle the disposal of the checks. The agent however could not remember the method Olsberg described (A-52, A-53). Nevertheless the agent, to the best ost of his recollection, described the proposed machinations

Olsberg outlined (A-53). "Bruce" asked Coco and the agent to leave and spoke to Olsberg alone. Later the agent and Coco reappeared and Coco was directed to bring the checks and so he did (A-54). The initial discussion of the checks occurred February 9, 1973, when the agent first met Coco who brought the matter up (A-55).

On cross examination, the agent admitted that when he spoke to the appellant at the second meeting, and the only meeting the appellant attended, he spoke about counterfeit money which had nothing to do with the investigation the agent was working on (A-61). Prior to this meeting the agent never met the appellant before. At the second meeting on February 13, 1973 which the appellant did attend, that meeting lasted between fifteen and twenty minutes (A-66, A-67). At that meeting the agent admitted he asked the appellant whether he could dispose of counterfeit money and the appellant said he could (A-67, A-68). The agent did give Coco a counterfeit bill (A-68). After that meeting the agent never saw the appellant again (A-68). Nor did the appellant ever institute the conversation about the stolen checks (A-69).

Furthermore, when the agent did speak to "Bruce", "Bruce" never referred to the appellant (A-70).

Next, Herbert Olsberg, testified (A-72). Olsberg was cooperating with the Government in twelve cases as an undercover operator for the past fourteen (14) months prior to trial (A-72). His Government role was to buy checks and other things as the Government directed (A-72). For performing his role, the Government paid him $13,000. This sum was for expenses and "reward" money (A-73). Of that sum, $4,500 was given to him for his role in this case (A-73). This "reward" specifically was for the recovery of the missing checks (A-73). At trial, Olsberg was a "federally relocated witness" and had a new identity (A-74). In connection with his "new identity" Olsberg received living expenses from the Government (A-74). He was married and had seven children (A-74).

Olsberg also was convicted previously for two counts of fraud and also for passing a dishonest check for insufficient funds (A-74).

Olsberg related that on February 13, 1973 he met Coco (A-78). He was introduced by the agent, the Government's previous witness (A-76). Ultimately, Olsberg, the banker, and the agent drove to the vicinity of the appellant's house at East 39th Street and Farragut Road in Brooklyn (A-77). During the drive, Coco told them of a large transaction that would produce a lot of money (A-77). Ultimately, when they arrived at their destination, Coco left the car and returned with the appellant (A-78). The appellant and Coco sat in the rear of the car. Coco introduced the appellant as his "partner" Joey (A-78). Then Romano the agent produced a counterfeit bill and handed it to the appellant asking the appellant whether he could do anything with it. According to Olsberg, the appellant asked the agent how many bills he had and the agent replied that he had as many as the appellant "wanted" (A-78). The appellant asked to retain the bill stating that he would later, through Coco, tell the agent what he could do about this bill (A-79). Ultimately Coco said that he and the appellant and his "boss" had the stolen checks previously described and that if an agreement were reached he and Mauro, the appellant, wanted a 2-1/22 share of the money realized through the sale (A-81).

According to Olsberg, the appellant asked what Olsberg throught he could receive for passing the checks (A-82). Olsberg told the appellant that he couldn't answer that question at that particular time (A-82). The appellant was also said to have asked whether Olsberg understood what he and Coco were to get by way of a percentage (A-82). Coco then suggested another meeting set for February 16, 1973 at Paxton's Restaurant (A-85).

At the meeting of February 16, 1973 the appellant was not present. Coco and his friend "Mario" were present. Coco stated that he had to discuss the matter of the stolen checks with his "partner" (A-84, A-85). This referred to the appellant (A-84, A-85). Coco allegedly also told the witness in the appellant's absence how the "split" would be made, Coco saying that he and the appellant were to receive 2-1/2% of the proceeds, and that 23% was to go to his "boss" (A-85). Coco then showed Olsberg a photostatic copy of a cashier's check drawn on the bank

described in the indictment for $2.76 million dollars payable to a Clark Gorman.

Olsberg also told Coco that he couldn't do anything with the copy and that he had to have the original. Coco then stated that he and the appellant were responsible to the "boss" and Olsberg would have to deposit $25,000 before the checks would be handed over (A-86, A-87). Thereupon another meeting was arranged for February 20, 1973 but was not kept.

The final meeting was had on February 27, 1973 at Paxton's Restaurant (A-88). Coco, the agent "Bruce" whose surname was Romanoff, and Olsberg were present. Olsberg spoke to Romanoff alone (A-88). The terms of the proposed transaction were discussed and copies of the checks were shown. Olsberg discussed how the checks would be disposed of. Thereupon Romanoff told Coco to get the checks, Coco did so and they were shown to Olsberg. They amounted to over eight million ($8,000,000) dollars (A-93, A-94). On cross examination Olsberg admitted that at the meeting which the appellant attended, the federal agent brought up the matter of counterfeit money (A-96). Furthermore, it was Coco who initiated the discussion about the checks (A-97). Olsberg was confronted with the grand jury minutes of his testimony had February 26, 1973; these showed that he had never mentioned the appellant or testified about a meeting where the appellant was present (A-100).

Olsberg was also questioned about his testimony before a grand jury had April 26, 1973. That testimony related to $25,000 being placed in escrow. He testified before the grand jury in answer to questioning by the prosecutor, that the $25,000 would be placed in a cash account in his name and Mr. Coco's name. He replied that it would be placed in a safe deposit box. However, this testimony in no way related to the appellant (A-108, A-109).

On re-direct examination Olsberg was questioned about his grand jury appearance on May 1, 1973 (A-112). These minutes covered the meeting of February 13, 1973 when Olsberg met the appellant. His testimony before the grand jury was that he met

the appellant through Coco; that Coco said that the appellant was his partner and that "they requested . . . points for the total amount of moneyobtained on the checks . . ." (A-113).

On re-cross examination Olsberg admitted that between the two times that he appeared before the grand jury he spoke to the Government prosecutor before testifying (A-113). In his testimony of February 26, 1973 the only thing he stated as to the appellant was that Coco introduced them (A-114).

THE DEFENSE

The appellant testified that he was married for eleven years and that there were three infant children of the marriage (A-134). That at the time of the trial he was never convicted of any crime (A-134). Coco was his friend and he saw him one or two times weekly (A-134). On February 13, 1973, a Tuesday, at 9:30 P.M., he was at home with his wife and four friends (A-135). Coco came and asked the appellant to meet some people who were outside the house (A-136). The appellant accompanied Coco and he entered the car where the agent and Olsberg were (A-136). Coco told the appellant that the agent and Olsberg had counterfeit money. The appellant replied that he couldn't do anything with counterfeit money. The agent handed him a bill and asked him to evaluate it. The appellant stated that it looked "good" but the time was inappropriate to handle counterfeit money, and that he once was arrested for a conspiracy regarding the handling of counterfeit money (A-137, A-138). He stayed in the car fifteen minutes (A-138).

The appellant further testified that he did not discuss at any time either in the car or elsewhere stolen checks (A-139). That either the agent or Olsberg said that if the appellant could handle counterfeit money to let Coco know in that they had a source of counterfeit money and that a good price could be worked out (A-139). Thereupon the appellant left, saying he would let Coco know about the counterfeit money (A-139).

However, the appellant never spoke about counterfeit

money at any other time thereafter (A-139). Nor did he ever see the agent or Olsberg thereafter (A-139).

The appellant's wife was a substitute school teacher (A-140).

The appellant further testified he knew nothing about stolen checks nor did he ever discuss anything with reference to stolen checks (A-140).

On cross examination the appellant testified that he saw counterfeit money but never handled it (A-142). That when counterfeit money was brought up he was annoyed and that he wanted to leave immediately (A-142).

He explained his parting statement that he made to the agent and Olsberg to the effect that he would let them know about handling counterfeit money, as being due to the fact that he didn't care what they thought and that the statement was absolutely meaningless (A-143).

He described his relationship with Coco as being purely social and that he never had any business dealings with him (A-143).

The appellant further testified that he met "Bruce" (A-144).

On re-direct examination the appellant related that he met "Bruce" the summer before when Coco told him he had a friend who was a private investigator and introduced him (A-147).

Coco testified that his only relationship with the appellant was social (A-150). He met the agent whom he knew as "Romano" (A-151). He also met the agent around February 12th or February 13th, 1973 (A-151 — A-152). On that occasion, the agent showed him stock certificates and asked im to find out whether they were valid (A-152). At that time he didn't discuss counterfeit money or checks (A-153). He thereupon made an appointment with the agent about the stock certificates (A-153, A-154). The following Tuesday was the day of the appointment and he met the agent and Olsberg (A-154, A-155). At that meeting he told the agent that the stock certificates were worthless and returned them to the agent (A-154, A-155). The agent then told him that he had counterfeit money and after Coco told

him that the appellant, his friend, might be interested they set about to meet the appellant (A-156). During the drive to the appellant, there was no discussion of the cashier's checks (A-157).

Arriving at their destination Coco called the appellant who went to the agent's car (A-158). After the appellant heard of the counterfeit money he stated that he wanted no involvement (A-158). However, the agent showed the appellant a sample of the counterfeit money, who looked at it and said it was "good" (A-159). The appellant took the bill and said he would let Coco know whether he found somebody who could use it (A-160). This meeting lasted fifteen (15) to twenty (20) minutes. There was no discussion about stolen checks (A-160).

After the appellant left the car, the agent drove Coco home and gave him a telephone number that he could call him on (A-160, A-161). Later and either on February 14th or February 15th, 1973 Coco called the agent (A-162, A-163). An appointment was made to meet in Paxton's Restaurant the following Friday. Coco stated he was invited to go there to eat and enjoy other pleasant diversions (A-163). At that meeting, Coco told the agent that he didn't hear about the counterfeit money. Then the discussion centered about Coco having "something" but that he would have to talk to "Bruce" Romanoff. This related to the checks (A-165). Until that time there was no talk about the checks (A-165, A-166). The appellant and Romanoff had no relationship as to these checks (A-166).

Coco pled guilty to the conspiracy alleged in the first count of the indictment (A-166 — A-167).

On cross examination, Coco testified that he introduced the appellant as his "partner" but this related to a partnership in regard to the handling of counterfeit money and he did this merely to procure a share in the proceeds (A-168).

POINT I

THE GUILT OF THE APPELLANT WAS NOT ESTABLISHED UNDER THE CONSPIRACY COUNT BECAUSE THERE IS NO PROOF THAT THE APPELLANT KNEW THAT THE BANK WAS FEDERALLY INSURED: ADDITIONALLY, THERE WAS NO PROOF OF THE APPELLANT'S PARTICIPATION IN THE CONSPIRACY:

The substantive statute, the breach of which, was alleged to be the purpose of the conspiracy is found in Section 2113 of 18 U.S.C. Subdivision (c) thereof makes it a crime to receive, possess, conceal, store, barter, sell or dispose of property or money in excess of $100.00 with knowledge that the same was taken from a bank or a savings and loan association in violation of preceeding subdivision (b) which deals with theft. However, subdivision (f) of that statute states as follows:

> "(f) As used in this section the term 'bank' means any member bank of the Federal Reserve system and any bank, banking association, trust company, savings bank or other banking institution organized or operating under the laws of the United States and any bank the deposits of which are insured by the Federal Deposit Insurance Corporation."

The first count of the indictment charging conspiracy, alleged that the parties to the conspiracy would receive, possess, barter, sell and dispose of the property, namely the cashier checks aggregating over Eight Million ($8,000,000) Dollars, with knowledge that the checks were taken from the described bank and then stated:

> ". . . the deposits of which are insured by the Federal Deposit Insurance Corporation." (A-178).

In instructing the jury, the Court stated a bank meant the deposits of which were insured by the Federal Deposit Insurance Corporation (A-177). It will be noted that the indictment did not allege that the appellant knew that the bank was federally insured.

A bank as such, is not necessarily an insured bank. Rather, to become an insured bank with the Federal Deposit Insurance Corporation an application has to be made to the appropriate federal agency and approval has to be procured. 12 U.S.C. 1815 in its relevant portions states as follows:

> "1815. Non-Member Banks May Become Insured Banks — Subject to the provisions of this act . . . any national non-member bank which is engaged in the business of receiving deposits, . . . upon application by the bank and certification by the Comptroller of occurrency in the manner prescribed . . . and any state non-member bank, upon application to an examination by the corporation and approval by the board of directors may become an insured bank . . ."

The indictment as noted did not charge that the appellant knew that the checks stolen or forged were taken from a federally insured bank. Nor did the Government's proof in its entirety show that the appellant knew that the bank was federally insured.

It is put, that in order for the Government to make a case against the appellant in regard to the conspiracy count, such knowledge had to be shown. In *U.S. v. Crimmins*, 123 F. 2d 271 (Cir.—2) this Court held that a conspiracy to transport stolen securities in interstate commerce was not actionable unless an accused was shown to have understood the criminal venture in all its essential aspects relative to the elements of the substantive crime. In other words, the interstate nature of the theft. The appellant in that case was not shown to have known of the in-

terstate aspects of the crime as was held by the Court at pages 272-273.

Therefore, even if the federal insurance arrangement would not have had any bearing as to appellant's desire to participate, this would make no difference. For as held in *Crimmons*, at page 273:

> ". . . the jury might have indeed concluded that if he had known that they came from outside the state, it would have made no difference in his conduct; but that is not enough; it would be no more than to say he would have been willing to make an agreement which in fact he did not make. . ."

In *Ingram v. United States*, 380 U.S. 672 (1959), certain of the petitioners were convicted with others for a conspiracy to violate the federal revenue laws governing the taxation of gamblers. The convictions of certain of the petitioners were reversed because it was not established that these persons were connected with an illegal gambling enterprise and conspired to violate the federal tax laws. It was stated on pages 677-678 that:

> "It is fundamental that a conviction for conspiracy under 18 U.S.C. Section 371 cannot be sustained unless there is 'proof of an agreement to commit an offense against the United States' . . ."

It was further stated on page 680 in regard to certain of the petitioners that:

> ". . . evidence that Smith and Law might have wanted the taxes to be evaded if they had known of them, and that they engaged in conduct which could have been in furtherance of a plan to evade taxes if they had known of them, is not evidence that they did know of them."

In *U.S. v. DeMarco, et al.*, Second Circuit, numbers 488, 489, 604, 605 — September 1973 Term, December 12, 1973, docket number 73-1768, etc., slip opinion page 731, the appellants were convicted for possession of stolen property and for a conspiracy. In regard to the conspiracy count, the conviction was reversed this Court stating on page 737 that an instruction was defective where the Court did not instruct the jury that they must find not only that the goods were stolen but that the defendants knew they were stolen from an interstate shipment.

So also in *U.S. v. Rizzo*, number 600 September 1973 Term, Court of Appeals, Second Circuit, docket number 73-2428, 1599, slip opinion, page 1599, it was stated that the question before this Court was whether in respect to the conspiracy charge there was evidence that the appellant knew of the interstate character of the theft involving the designated merchandise. It was held that while circumstantial evidence can be introduced to show such knowledge, there was nothing before the jury which could give rise to an inference that the appellant knew that the stolen property was travelling in interstate commerce. In *U.S. v. Gallishaw*, 428 F. 2d 760 (Cir.-2, 1970), this Court reversed a conviction for a conspiracy to rob a bank in violation of 18 U.S.C. 2113, (a)(d). The appellant was shown to have supplied a weapon to a witness who stated he would either use it to commit the robbery of a bank or some other robbery, page 762. It was stated on page 763 that:

> ". . . On this record, to convict Gallishaw for the substantive crime of aiding and abetting a violation of 18 U.S.C. 2113(a), the government would have had to show at a minimum that he knew that a bank was to be robbed. To convict him of conspiracy at the very least no less was required . . ."

It is respectfully submitted to this Court, that this issue, a jurisdictional issue, is a substantial one. As was noted in *Rewis v. United States*, 401 U.S. 808, at 812,

"... substantial amounts of criminal activity, traditionally subject to state regulation ..."

It is therefore put to this Court that the Supreme Court of the United States has noticed that the greater amount of criminal activity is subject to state regulation.

This same concept was expressed by this Court in *U.S. v. Archer*, 486 F. 2d 670, (Cir.-2d, 1973), 677-678:

"... today there is widespread concern whether the federal criminal law has not outrun reasonable bounds; 'Federal auxiliary criminal jurisdiction' has spread to the point where 'there is practically no offense within the purview of local law that does not become a federal crime if some distinctive federal involvement happens to be present.' ..."

"While responsibility for keeping federal criminal investigations and prosecutions within the bounds appropriate on the assumptions inherent in a federal system should rest in the first instance with the United States Attorneys under the act of guidenance of the Attorney General ..., we are not prepared to say, that absent congressional limitation, a federal court may never dismiss a prosecution as an abuse of federal power ..."

Consequently, the issue is whether the 10th Amendment to the Federal Constitution is of diminishing effect, in the area of the enforcement of criminal statutes, and the control of criminal activity. The 10th Amendment reserves power in the states or the people where such power has not been delegated to the federal government.

In regard to the Government's case, against the appellant, the proof showed at most in regard to the appellant's presence, and what he allegedly said, was in discussion of how Olsberg was to

dispose of the checks, and how the proceeds were to be distributed (A-82, A-83). Thus, the appellant was said by Olsberg to have asked when he and Coco would realize their share (A-83).

Realistically, this testimony at most, went to inquiry and negotiation running to the commission of an act, the commission of the substantive offense, involving the disposal of the checks rather than showing that the appellant was a conspirator. There is a distinction between the commission of a substantive act, and a conspiracy. In *Pereira v. United States,* 347 U.S. 1 (1953), at pages 11-12 it was stated:

> ". . . the essence of the conspiracy charge is an agreement . . . Pereira's conviction on the substantive count does not depend on any agreement, he being the principal actor. Similarly, Brading's conviction does not turn on the agreement. Aiding and abetting and counselling are not terms which presuppose the existence of an agreement. Those terms have a broader application making the defendant a principal when he consciously shares in a criminal act, regardless of the existence of a conspiracy. . ."

Nor is preparation for the commission of a crime consisting of the substantive act, or an attempt to commit the substantive act, sufficient to make the accused a conspirator. See *U.S. v. Coplan,* 185 F. 2d 629, 633 (Cir.-2d, 1950). There, this court drew the distinction between inchoate crimes such as attempt, preparation and conspiracy.

In *U.S. v. Borelli,* 336 F. 2d 376, 384 (Cir.-2d, 1964), it was held that the conspiracy is principally an agreement. True a criminal agreement but nevertheless an agreement. Consequently, in order to hold an accused responsible for certain acts committed pursuant to the conspiracy, it must first be ascertained just exactly what he agreed to and what his understanding was.

The fact that each of the multiple parties may have acted wrongfully and even sought to achieve a common end, does not support a conviction for a conspiracy, see *U.S. v. Direct Sales*, 40 F.S. 917 at page 922, (D.C.W.D.S.C.—1941), affirmed 131 F. 2d 835, *Direct Sales v. United States*, 319 U.S. 703. Furthermore, there was a deficiency in proof to show that the appellant was a conspirator because at most the proof showed that the appellant participated in a single act, namely his presence at one meeting. This is insufficient to show he was a party to a conspiracy. As was stated in *U.S. v. Aviles*, 274 F. 2d 179 (Cir.-2d, 1960) at page 190 where it was stated as follows:

> "The single purchase alone was not enough to prove that Rodriguez was a participant in the conspiracy. It was necessary to the government's case to submit evidence that Rodriguez knew of the conspiracy and associated himself with it . . . From evidence of knowledge of the conspiracy and a transaction with one of its members it would be reasonable to infer intent to participate in it, but there was no such evidence of knowledge here. *Nor was there evidence of a continuous course of dealing between Rodriguez and Cantellops, which might warrant the inference that Rodriguez had knowledge of the character of the source from which his narcotics came . . .*" (Emphasis supplied).

It is respectfully submitted that a reading of the evidence in this case, shows that at most, the appellant according to the Government participated in a discussion and wanted to know what the share of the proceeds would be for himself and Cocco. However, this may have been mere bargaining, and taking the statements from the Government's witnesses as true, at most showed that the appellant was speculating. It does not support any conclusion that the appellant was part of a conspiracy. Contact with other conspirators, does not make a person a member of a conspiracy. See *U.S. v. DeCavalcante*, 440 F. 2d, 1264 (Cir.-3rd) 1971, at page 1275 where the Court held that

DeCavalcante's statements where he tried to settle a dispute between several persons, in regard to gambling, was not enough to draw him into the conspiracy described in the indictment.

It will be recalled that the appellant's witness Coco, testified that he used the term "partner" in relationship to the agent asking the appellant to handle counterfeit money. It may also be recalled that Olsberg's testimony which involved the hearsay apparently under the hearsay exception in regard to co-conspirators, stated that Coco mentioned that the appellant was his partner. However, in this case, the appellant's witness Coco rebutted this. Coco's testimony showed that his expression was used for his own self-interest; see THE CONFRONTATION CLAUSE AND THE CO-CONSPIRATOR EXCEPTION IN CRIMINAL PROSECUTIONS: A FUNCTIONAL ANALYSIS, 85 Harvard Law Review at page 1378, 1387. The testimony of the appellant and that of Coco is credible, because Coco's testimony involved a declaration against penal interest namely, that he wanted to handle counterfeit money, he wanted to handle it through the appellant, and that he also wanted a share of the proceeds. Since Coco's testimony was against his penal interest, it has a high degree of reliability; see *Harris v. United States*, 403 U.S., 573, (1971) at pages 580, 583.

Nor was Olsberg's testimony about Coco telling him what he and his "partner" expected to receive, relevant. This bargaining was not in furtherance of any conspiracy. If the theory underlying this facet of the evidence was that Coco's statements were in furtherance of the conspiracy, then it is submitted that a reading of these statements was not in furtherance of the conspiracy. Coco merely stated that he wanted a certain percentage and it may have been directed to his own interests; his further statement that he was to share with the appellant, may have been mere conversation, but certainly not in furtherance of any conspiracy. Declarations made by one co-conspirator, do not bind another party who is claimed to be a party to the conspiracy unless such statements are in furtherance of the purposes of the

conspiracy. See *Wong Sun v. United States*, 371 U.S. 471 (1963), at page 490. On the other hand, statements attributed to the appellant of what he expected to receive from the sale of the stolen checks, at most may be considered an admission. These were certainly not in furtherance of the conspiracy. However, if the same be deemed admissions then it is submitted, that there had to be corroboration to the effect that a conspiracy existed; see also *Wong Sun v. United States*, 371 U.S. 471 *supra*, at page 490 footnote 15.

The agent's testimony, did not specifically point out what the appellant stated at the only meeting he attended. However, Olsberg's testimony did. Yet his testimony before the grand jury showed that he didn't mention the appellant (A-100, A-103).

As was recently stated in *Agnellino v. New Jersey*, February 13, 1974, (Cir.-3rd) 14 Criminal Law Reporter, 2460, 2461, where it was held that silence at the time of inquiry, may be deemed an admission and an inconsistent statement, when testimony is later given about the very thing for which the witness was silent about.

Furthermore, even if Olsberg may not have been asked about the appellant, at the time of his initial appearance or appearances before the grand jury, it is respectfully submitted that certainly, the prosecutor must have known about the alleged role of the appellant and a failure to ask about the appellant when Olsberg appeared before the grand jury is not understandable.

POINT II

IF THE APPELLANT WAS NOT A MEMBER OF THE CONSPIRACY HE CANNOT HAVE BEEN GUILTY UNDER THE SUBSTANTIVE COUNT.

The theory of the prosecution was that while the appellant may not have committed any act involved in the second count, nevertheless he could be found guilty under that count if the acts

committed were pursuant to the conspiracy, and the persons who committed those acts, were the other parties involved, (A-130, A-190).

Conversely, if the appellant is not guilty of the conspiracy then his conviction under the substantive count must be set aside under the ruling of this Court in *U.S. v. Cantone*, 426 F. 2d 902.

CONCLUSION

THE JUDGMENTS OF CONVICTIONS SHOULD BE SET ASIDE

Respectfully submitted,

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Attorney for Appellant

ARNOLD E. WALLACH
Of Counsel
On the Brief

AFFIDAVIT OF PERSONAL SERVICE

STATE OF NEW YORK,
COUNTY OF RICHMOND ss.:

EDWARD BAILEY being duly sworn, deposes and says, that deponent is not a party to the action, is over 18 years of age and resides at 286 Richmond Avenue, Staten Island, N.Y. 10302. That on the 29 day of March, 19 74 at No. U.S. Court House Foley Square deponent served the within upon U.S. Attorney the Appellants Brief herein, by delivering a true copy thereof to h personally. Deponent knew the person so served to be the person mentioned and described in said papers as the Appellee therein.

Sworn to before me,
this 29 day of MARCH 19 74

Edward Bailey

Edward Bailey

William Bailey

WILLIAM BAILEY
Notary Public, State of New York
No. 43-0132945
Qualified in Richmond County
Commission Expires March 30, 1975